(22)

No. 95-1340

In the Supreme Court of the United States

October Term, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 2,000 lawyers who represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members counsel, and litigate on behalf of, employees regarding claims arising in the workplace.

NELA has an interest in this appeal because members of NELA increasingly have been called upon to counsel whistleblowers—employees who disclose fraud or other illegal conduct on the part of their employers. The False Claims Act is implicated whenever the employer in such a case is a Government contractor.

In this brief, NELA writes in support of Respondent Schumer on two points. *First*, that neither actual damages nor "harm to the public fisc" are an element of a cause of action under the False Claims Act (FCA). *Second*, that a disclosure which is limited to employees of the targeted contractor or contractors is not a public disclosure within the meaning of 31 U.S.C. § 3730(e)(4).

The positions taken by NELA in this brief have not been approved or financed by Respondent or his counsel.

Written consent for the filing of this brief has been obtained from Petitioner and Respondent, and these letters of consent have been filed with the Clerk pursuant to Sup. Ct. Rule 37.3.

SUMMARY OF ARGUMENT

Petitioner and its *amici* take different tacks in seeking to persuade this Court to reverse 50 years of consistent court decisions that damages need not be proven for civil penalties to be recoverable under the civil False Claims Act. Petitioner argues that the "public fisc" must be "implicated"; its *amici* say that actual monetary loss to the Government is an element of a claim under the FCA. However, this Court and many lower courts have so held, and legislative history reflects that Congress fully intended to embody the rule that actual damages are not necessary in the 1986 amendments to the Act. Therefore, both Petitioner and the *amici* advance propositions which fly in the face of settled law and the intent of Congress. Rather than accept their invitations to radical change, this Court should affirm the court of appeals and thereby reaffirm the long-standing principle that actual damage is not an

element of a claim under the FCA.

As to the question of what constitutes "public disclosure" for purposes of the jurisdictional aspect of 31 U.S.C. § 3730(e)(4), Petitioner would have this Court conclude that when employees of a Government contractor who are not active participants in contract fraud learn of facts supporting a *qui tam* claim from an audit report which is not publicly available, that constitutes "public disclosure" of those facts. This position was properly rejected by the Ninth Circuit, because the plain words of the statute mean that there must be a general dissemination of facts before they have been "publicly disclosed."

ARGUMENT

I. THE CONTENTION THAT DAMAGE TO THE UNITED STATES IS A REQUIRED ELEMENT OF PROOF FOR RECOVERY UNDER THE FALSE CLAIMS ACT IS OBVIOUSLY WRONG.

This Court should flatly reject the claims of certain of the *amici* supporting Petitioner that, in the words of one of them, "harm to the public fisc is an essential element for a cause of action under the False Claims Act." Brief of *Amici Curiae* Association of American Medical Colleges, *etc.* (hereafter the "Medical *amici*"), at 20. This assertion stands in direct opposition to five decades of judicial precedent, soundly based upon decisions of this Court, as well as the clearly-expressed Congressional endorsement of that body of case law. Petitioner and its *amici* have failed to acknowledge both the wealth of precedent and clear statements of congressional intent arrayed in

opposition to their position, thus tacitly conceding that their arguments are merely what they wish the law to be—rather than what the law is.

A. This Court's Decisions Establish That Damages Are Not An Element Of A Successful Cause Of Action Under The Act

The proposition that actual damages need not be proven in order to recover under the civil False Claims Act is firmly based on decisions of this Court. The cases most often cited are *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956) and *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

In *Hess*, this Court affirmed the district court's conclusion that "failure to show actual damages in these instances [where the Government apprehended the false claims before making payment] would not preclude recovery" under the False Claims Act. *United States ex rel. Marcus v. Hess*, 41 F.Supp. 197, 218 (W.D. Pa. 1941).

In *Rex Trailer*, the Court affirmed a finding of civil-penalty liability against a company which fraudulently took advantage of the veterans' preference in the Surplus Property Act to purchase war-surplus trucks. The Government sued the company. The complaint did not allege damages.

In this Court, Rex Trailer asserted that "the failure of the Government to allege specific damages precludes [civil-penalty] recovery here." 350 U.S. at 152. The Court rejected this proposition, likening the civil penalty to

liquidated-damage provisions, which "'serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many Government contracts ....'" *Id.* at 153, *quoting Priebe & Sons v. United States*, 332 U.S. 407, 411-12 (1947).

In rejecting the claim that actual damages must be alleged to state a claim under the Surplus Property Act, the Court relied upon the reasoning of *Hess*. The Court observed that the Surplus Property Act *was* "essentially the equivalent" of the False Claims Act. *Rex Trailer*, 350 U.S. at 152. Holding that "the fact that no damages are shown is not fatal" (*id.* at 153), the Court endorsed *Hess's* affirmance of the district court's holding that actual damages were not a predicate to recovery under the statute. 350 U.S. at 153 n.5. Confronted by a silent record, the Court inferred that "the fact that Rex was willing to resort to fraud to purchase the vehicles at the veteran's price strongly suggests an unfair gain from the purchases." *Id.* at 153 n.6.

Beyond *Hess* and *Rex Trailer*, this Court has demonstrated unflagging awareness that the submission to the United States of false contract claims causes harm to the integrity of the Government, including social and investigative costs, which extend well beyond "actual" damages. *E.g.*, *United States v. Halper*, 490 U.S. 435, 450-52 (1989) (referring to compensation under the FCA for the "costs [to the Government] of corruption" and remanding for determination of the Government's "actual costs" in the case, including costs of investigation]. The Court recognized in *Rex Trailer* that Congress has the authority to legislate against such claims in a manner which obviates the need for proof of such damages. There is no conceivable reason for this half-century of

consistent jurisprudence to be jettisoned, as Petitioner and its *amici* apparently urge.

B. Dozens of Published Opinions Demonstrate That Damage To The United States Is Not An Element Of Recovery Under The Act.

The subordinate federal courts, based upon obviously-correct readings of *Hess* and, later, *Rex Trailer*, "have always rejected the argument that the United States must suffer actual damages before the [civil] penalties under [the FCA] may be collected." *United States v. Cherokee Implement Company*, 374 F.Supp. 374, 375 (N.D. Iowa 1963) (collecting cases). At least three circuit courts of appeal had so held in the two decades preceding *Cherokee Implement*. *United States v. Rigdlea State Bank*, 357 F.2d 495, 497 (5th Cir. 1966); *Toepleman v. United States*, 263 F.2d 697, 699 (4th Cir.), *cert. denied sub nom. Cato v. United States*, 359 U.S. 989 (1959). *United States v. Rohleder*, 157 F.2d 126, 129 (3d Cir. 1946). Since *Cherokee Implement*; well over a score of published opinions holding that damages need not be proven in order to recover under the Act demonstrate great uniformity of judicial thought on this point.[1]

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[1] *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991); *United States v. Killough*, 848 F.2d 1523, 1533 (11th Cir. 1988); *United States v. Hughes*, 585 F.2d 284, 286 n.1 (7th Cir. 1978); *United States ex rel. Weinberger v. Equifax, Inc*, 557 F.2d 456, 460-61 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Brown v. United States*, 524 F.2d 693, 706 (Ct. Cl. 1975); *United States v. State Bank*, 357 F.2d 495, 497 (5th Cir. 1966); *Toepleman*, 263 F.2d at 699; *United States v. Tieger*, 234 F.2d

Occasional contrary holdings have either ended up in judicial Siberia, or, upon close examination, prove to be consistent with the substantial weight of authority.[2]

589, 590 & n.4 (3d Cir), *cert. denied*, 352 U.S. 941 (1956); *United States v. Rohleder*, 157 F.2d 126, 129 (3d Cir. 1946); *United States ex rel. Fahner v. Alaska*, 591 F.Supp. 794, 798 (N.D. Ill.1984); *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965); *United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F.Supp. 1507, 1509 (M.D. Tenn. 1996); *Wilkins ex rel. United States v. State of Ohio*, 885 F.Supp. 1055, 1060 (S.D. Ohio 1995); *United States ex rel. Fallon v. Accudyne Corp.*, 921 F.Supp. 611, 628 (W.D. Wis. 1995); *United States v. Kensington Hospital*, 760 F.Supp. 1120, 1227 (E.D. Pa. 1991); *United States ex rel. Luther v. Consolidated Industries, Inc.*, 720 F.Supp 919, 923 (N.D. Ala. 1989); *United States v. CFW Construction Co*, 649 F.Supp 616, 618 (D.S.C. 1986); *Blusal Meats, Inc. v. United States*, 638 F.Supp. 824, 827 (S.D.N.Y. 1986); *Thevenot v. National Flood Insurance Program*, 620 F.Supp. 391, 396 (W.D. La. 1985); *United States v. Rapoport*, 514 F.Supp. 519, 524 (S.D.N.Y. 1981); *United States v. Zulli*, 418 F.Supp. 252, 253 (E.D. Pa. 1975); *United States v. Silver*, 384 F.Supp. 617, 620 (E.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 505 (2d Cir. 1975); *United States v. Johnston*, 138 F.Supp. 525, 527-28 (W.D. Okla. 1956); *United States v. American Precision Products Corp.*, 115 F.Supp. 823, 827-828 (D.N.J. 1953).

[2]Courts have from time to time included, in general recitations of the elements of a claim under the Act, an element of damages. *E.g.*, *United States ex rel. Stinson v. Provident Life & Accident Ins. Co.*, 721 F.Supp. 1247, 1258-59 (S.D. Fla. 1989), *citing Blusal Meats, Inc. v. United States*, 638 F.Supp. 824, 827 (S.D.N.Y. 1986). However, such statements are uniformly *dicta*; for example, in *Blusal Meats*, the district court—in the same paragraph as its statement that the elements of a claim included "(4) that the United States

In sum, both *Hess* and *Rex Trailer* provide a solid foundation upon which literally dozens of federal judges, who have concluded that damages need be neither plead nor proven in a case under the False Claims Act, have built a solid wall which Petitioner and its *amici* now wish to tear down.

C. THE LEGISLATIVE HISTORY OF THE 1986 AMENDMENTS TO THE ACT DEMONSTRATES THAT CONGRESS UNDERSTOOD THAT DAMAGES WERE NOT AN ELEMENT OF A CAUSE OF ACTION UNDER THE FALSE CLAIMS ACT, AND EXPLICITLY APPROVED THAT RULE.

The 1986 amendments to the False Claims Act, Pub. Law 99-562 (99th Cong., 2d Sess.) resulted from adoption of the Senate bill, S. 1562. The Senate Report, in a section entitled "History of the False Claims Act and Court Interpretations," set out the Judiciary Committee's understanding that "[t]he United States is entitled to recover [civil penalties] *solely upon proof that false claims were made, without proof of any damages.*" S. Rep. No. 99-345, 99th Cong., 2d Sess. at 8, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5266, 5273 (emphasis supplied), *citing Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965). The

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suffered damages as a result of the false or fraudulent claim," 638 F.Supp. at 827—added, *"the United States may recover costs and a $2,000 civil penalty for each FCA violation in the absence of proof of damage to the United States."* *Id.* (italics supplied). In *Wilkins ex rel. United States v. State of Ohio*, 885 F.Supp. 1055, 1059 (S.D. Ohio 1995), the district court sets out a similar boilerplate recitation of elements— but says, a page later, that "no damages need be proved in order to recover the civil penalty" provided for by the Act. *Id.* at 1060.

Committee also said:

> The cost of fraud cannot always be measured in dollars and cents .... GAO pointed out ... that fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs. Even in the cases where there is no dollar loss—for example where a defense contractor certifies an untested part for quality yet there are no apparent defects—the integrity of quality requirements in procurement programs is seriously undermined.

S. Rep. No. 99-345 at 3, 1986 U.S. Code Cong. & Ad. News at 5268. Consistent with such cases as *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429 (Ct. Cl. 1994),[3] the Senate Report makes clear that the 1986 amendments were intended to reach claims which "may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program[.]" *Id.* at 9, 1986 U.S. Code Cong. & Ad. News at 5274.

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[3] In *Ab-Tech*, a construction contractor falsely represented that it was eligible for participation in a minority set-aside program. The court of claims held that civil penalties were available to the United States, although the Government got all it bargained for in contract, because the contractor was ineligible to participate in the program pursuant to which the contract was awarded. *Ab-Tech* is analytically quite close to *Rex Trailer*; in neither case was there the direct assault upon the Treasury which Petitioner would have the Court mandate.

Even a silent Congress is presumed to be aware of preexisting case law interpreting statutes. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Where an amending Congress does not take explicit note of existing law, it may be viewed as agreeing that the courts have properly interpreted it. *Cf. Bob Jones University v. United States*, 461 U.S. 574, 599-601 (1983) (Congressional failure to modify well-known administrative regulations may be viewed as Congressional endorsement of agency's interpretation of statute).

Here, Congress repeatedly took explicit note of the no-actual-damages jurisprudence which had developed over the four decades before it undertook the 1986 amendments. The Senate Report indicates obvious approval of that jurisprudence. There is not the slightest indication that the Judiciary Committee intended the 1986 amendments to the Act to vitiate or mitigate the no-actual-damages rule. There is, in short, no reason whatever for this Court to do any more than reiterate that actual damages are not an element of a cause of action under the False Claims Act.[4]

II. PETITIONER'S ARGUMENT THAT THE "PUBLIC FISC" MUST BE IMPLICATED IN A CIVIL FALSE CLAIMS ACT CASE IS UNSUPPORTED BY THE JURISPRUDENCE AND INCONSISTENT WITH CONGRESSIONAL PURPOSE

Petitioner's position appears to be somewhat less aggressive than the "actual damage must actually be proven" assertion of the Medical *amici*.[5] The crux of Petitioner's argument on the question whether "the public fisc" must be implicated in a civil False Claims Act case is its assertion that "[t]he statute does not target any and all transgressions by a Government contractor. Rather, it targets a specific type of transgression: the submission of

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[4] Petitioner and its many *amici* are conspicuously silent on the legislative approval given the no-actual-damage jurisprudence in the course of the process leading to passage of the 1986 amendments. Their unwillingness even to attempt to show that the interpretation of the statute they now urge upon this Court is consistent with the intent of Congress speaks eloquently to its weakness.

[5] The suggestion by the Medical *amici* that "instances of fraud with potential—but still inchoate—fiscal ramifications do not fall within the scope of the FCA" (*Br. Med. Amici* at 25) departs so far from the cases and the intent of Congress as to merit only marginal attention. This claim is precisely contrary to this Court's affirmance, in *Hess*, 317 U.S. 537, of the district court's conclusion that actual damages need *not* be shown in such instances. It is also directly contrary to the only court of appeals case which lends even a modicum of support to Petitioner's argument, *United States v. Azzarelli Construction Co.*, 647 F.2d 757, 760-61 (7th Cir. 1981), which (interpreting the pre-1986 iteration of the FCA) spoke of the need to establish "injury" but held that unpaid false claims *caused* "injury." The unwillingness of the *amici* to concede this elemental point demonstrates well that what they advance is a position wholly inconsistent with precedent, and what they seek from this Court is a radical revision of the law. Moreover, the case upon which they rely, *United States v. McNinch*, 356 U.S. 595 (1958), is obviously reconcilable on the basis that an application for insurance coverage, false or not, is not a *claim for payment*. Whether the result would be the same today, given the "uses . . . a false record to get a . . . claim paid or approved" language of 31 U.S.C. § 3729(a)(2), is to say the least an open question.

an inflated request for payment." *Br. Pet.* at 39. According to Petitioner, "[t]o establish liability under the FCA, the Government (or a qui tam relator) must at the very least allege and prove that a particular transgression resulted in an excessive demand for Government money." *Id.*

If Petitioner means that the False Claims Act is offended only where there is an overbilling, that assertion flies in the face of years of judicial teaching—most notably, that of *Rex Trailer*— as well as the intent of Congress when it enacted the 1986 amendments.[6] Petitioner's interpretation also is unsupported by the plain language of the False Claims Act. It proscribes knowing submission, or knowingly *causing* submission, to the Government of a false or fraudulent claim for Government payment or approval. 31 U.S.C. § 3729(a).[7] Whether that demand is "excessive" is immaterial: What matters is its *falsity*.

As Petitioner notes, "not every false statement gives rise to a false claim" (*id., citing Hubbard v. United States*, ___ U.S. ___, ___, 115 S. Ct. 1754, 1760 (1995). That

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[6] "The cost of fraud cannot always be measured in dollars and cents . . . . Even in the cases where there is no dollar loss . . . the integrity of quality requirements in procurement programs is seriously undermined." S. Rep. at 3, *reprinted in* 1986 U.S. Code Cong. & Admin. News at 5268.

[7] There actually are seven categories of prohibited acts, enumerated in 31 U.S.C. § 3729(a)(1)—(7). These range from submission of false claims for payment, to creating or using a false record to get a false claim paid, to conspiring to get a false claim paid, to knowingly making or using a false record to conceal, avoid, or decrease an obligation to make payment to the Government. *Id.*

bland assertion does not significantly advance Petitioner's position. What Petitioner omits from the mix is that any materially false statement submitted in connection with a claim for payment makes the claim for payment itself false. For example, *United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 199 (D.C. Cir. 1995) held that submission of progress reports falsely certifying that computer software worked (when it did not) were—although they were not themselves invoices—"false statements in support of false claims and would trigger the Act's civil penalty."

Petitioner also suggests that interpreting the False Claims Act to cover anything other than "an excessive demand for Government money" would "subsume the False Statements Act, 18 U.S.C. §1001." Br. Pet. at 39. This suggestion, repeated by the Medical *amici* (*Br. Med. Amici* at 29), is unpersuasive. At the threshold, it is Petitioner and its *amici* who are urging this Court not only to abandon 50 years of judicial precedent, but to ignore the clear adoption by Congress of that precedent. The making of a false claim for payment is an element of a claim under the False Claims Act. The same conduct might also support a criminal conviction under 18 U.S.C. § 1001 *(e.g., United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988)). However, the suggestion of the Medical *amici* that use of the False Claims Act to recoup taxpayer expenditures toward the investigation of false claims which do not cause excess contract payments turns it into a "civil False Statements Act" is neither here nor there: The simple fact is that it has long been recognized that "proof of actual damage is not a prerequisite to the recovery of a forfeiture under the False Claims Act .... [T]he investigation necessary to detect a false claim costs the Government money even if no money

is paid on the claim." *United States v. Ridglea State Bank*, 357 F.2d 495 (5th Cir.1966). *Accord, Thevenot v. National Flood Insurance Program*, 620 F.Supp. 391, 396 (W.D. La. 1985).

Simply stated, this proposition is neither doubtful nor offensive: If one makes false claims to the United States, or causes another to do so, the costs to the taxpayers of the investigation of those false claims should, if Congress so legislates, be borne by the party which caused them to be incurred.[8] Indeed, that concept is firmly embedded in *Halper*, 490 U.S. 435. When contractors choose to ignore the requirements of their contracts, both the drain on Government resources and the harm to the integrity of the Government contracting system are real—whether or not the Government is overbilled.

The Medical *amici* go to great lengths to demonstrate that the Government did, indeed, suffer damages in *Rex Trailer*. *Br. Med. Amici* at 24-25, 27. They assert that such damages included "proprietary harm when the

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[8] The suggestion by *amici* that permitting an action for civil penalties to proceed where there are no damages other than the cost of investigation would "convert the FCA into a civil False Statements Act designed to fund Federal auditors" (*Br. Med. Amici* at 29) is a *non sequitur*. Why should the public fisc, upon which Petitioner and its *amici* gaze so fixedly, bear the expense of investigating the extent to which false statements by a Government contractor have damaged that fisc? It is, in this context, obvious that there is substantial wisdom to the test being not whether or not the false claims caused actual damage, but whether they satisfy the elements established by Congress in §3729(a). If they did, it is entirely fair and appropriate to require the contractor to answer for its conduct.

defendants swindled it out of the trucks" earmarked for veterans, and quote this Court's observation that the Government was injured by way of depletion of the supply of trucks available to Government agencies. *Br. Med. Amici* at 25. To be sure, this Court did indeed observe that even though the Government could not prove monetary damage against Rex Trailer, its goals were thwarted and it may have had less trucks for itself (not, however, a point which was in the record).

The *amici* would have done well not to make this argument, for it demonstrates precisely the negative of the proposition they wish to prove. If they would have the Court believe that there were, in fact, "actual," hard-dollar damages in *Rex Trailer*, their analysis is patently revisionist: The very issue before the *Rex Trailer* Court was whether a complaint which failed to allege actual damage stated a claim upon which relief could be granted. 350 U.S. at 152. The Court found that it did-– that "the fact that no damages are shown is not fatal." *Id.* at 153. While the *amici* strive to discount this as mere *dictum*, this suggestion is sharply at variance with the fact that the Government neither alleged nor proved damages: The fact is, *Rex Trailer* squarely supports the proposition that injury to Government programs and policies is precisely within the sphere of damage remedied by imposition of civil-penalty remedies.

Many courts—including this one—have recognized that the civil-penalty provision in the Act works to permit the Government to recoup *all* its losses in a case of false claims for payment by, or occasioned by, a contractor or its subcontractor– even where those false claims did not cause the Government to pay out money. What the Court actually reasoned in *Rex Trailer* was that incalculable

damage to the United States—the thwarting of the Surplus Property Act's purpose by "preclud[ing] bona fide sales to veterans, decreas[ing] the number of motor vehicles available to Government agencies, and tend[ing] to promote undesirable speculation" (*id.* at 153)—was sufficient to justify imposition of civil penalties upon the defendant. These "damages" were obviously incalculable, and assuredly did not cause, in any legal sense, a loss of money—calculable or incalculable—to the United States.

The costs identified by *Rex Trailer* have proven important to other courts considering whether damages need not result from a false claim for it to be actionable. For example, in *Ab-Tech Construction,* 31 Fed. Cl. 429, a contractor falsely certified its compliance with the Small Business Administration's minority-owned business program established by Congress in Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a). The Government had brought suit under the False Claims Act, but offered "no proof . . . to show that [it] suffered any detriment to its contract interest" as a consequence of the fraud. *Id.* at 434. "Rather, viewed strictly as a capital investment, the Government got essentially what it paid for[.]" *Id.* The court therefore concluded that the Government had sustained no actual damages, but permitted recovery of civil penalties under the FCA. *Id.* at 435.

Noting this Court's reference in a closely-related context to the compensable nature of the "'costs of corruption'" (*Ab-Tech*, 31 Fed. Cl. at 435, *quoting Halper*, 490 U.S. at 450), the *Ab-Tech* court held as follows:

> In this case, such costs would include the added administrative burdens imposed on the Corps of Engineers and the SBA in their respective inquiries into the nature of the business relationship between Ab-Tech and [its subcontractor]; the expense of the criminal investigation undertaken by the Department of Defense Inspector General; the expenses associated with the grand jury's investigation and the ensuing criminal trial; and most significantly, the societal cost associated with Ab-Tech's abuse of the section 8(a) program.

Ab-Tech, 31 Ct. Cl. at 435.

Here, Petitioner and its *amici* flatly refuse to acknowledge the damaging—and compensable—nature of these injuries. They also refuse to acknowledge, as is the clear import of *Rex Trailer*, that Congress had both the *intent* and the *authority* to create a statutory cause of action which allows recovery of amounts intended to compensate for such injuries without proof of "actual" loss.

The losses identified in, *e.g.*, *Rex Trailer* and *Ab-Tech* are costly insults to the sovereign caused by the taking of improper (in the truest sense, "undue") advantage of it by those who wish to participate in the sovereign's programs, or who choose, with their own profit in mind, to solicit the sovereign's business. Petitioner apparently would ask this Court either to reject those holdings, and the many others like them, or conclude that they are qualitatively different than the damage caused the Government by the diversion of investigative resources and the damage to the integrity of the contracting process caused by a contractor who, in jet-fighter development programs worth hundreds of millions (or billions) of dollars, elects not to comply with the precise terms of its contract.

While the Medical *amici* express dismay at the suggestion that this case might proceed "[w]hen the *only* concrete harm that Schumer can allege is the cost of the same Government investigation which prompted the Government to withdraw its finding of noncompliance" (*Br. Med.* Amici at 29), that proposition, viewed in the context of 31 U.S.C. § 3729(a)(1), is unexceptional. What is significant is the fact that there are triable issues of fact whether Petitioner filed (or caused its prime contractor to file) false claims for payment. If it did, then the fact that a complex and protracted investigation eventually determined that Petitioner had not cost the Government money *in addition* to the expense of the investigation caused by the conduct underlying the false claims is simply irrelevant to the question whether a cause of action has been stated.[9]

This Court should reject in their entirely the arguments of Petitioner and its *amici* on both the question whether "actual damages" are an essential element of an action under the FCA, and the related question whether a "threat to the public fisc" is an element of such a cause of action. Long-standing precedent both establishes the contrary principle and serves well the national interest in ferreting out fraud.

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[9] Simply put, the public fisc *is* "implicated" when tens or hundreds of thousands of taxpayer dollars must be spent to determine the impact of contractual noncompliance by Government contractors, and limited investigative resources must be diverted from other matters.

III. PETITIONER'S ACCOUNTING IRREGULARITIES WERE NOT "PUBLICLY DISCLOSED," AND SO THE JURISDICTIONAL BAR WAS NOT TRIGGERED

The 1986 amendments to the FCA were intended by Congress to "encourage more private enforcement suits." S. Rep. at 2, *reprinted in* 1986 U.S. Code Cong. & Ad. News at 5266. This result was desired because the Government was being overwhelmed by fraud on the part of its contractors.[10] Indeed, Petitioner itself has recently

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[10] As one treatise has summarized the situation found by Congress:

> [I]n 1985, four of the largest defense contractors (General Electric, GTE, Rockwell and Gould) had been convicted of criminal fraud offenses within the last year. Another of the largest defense contractors, General Dynamics, had been indicted in a massive fraud scheme. And 45 of the largest 100 defense contractors remained under investigation for multiple fraud offenses. In the 1980s, fraud against the Government was on a steady rise. Department of Defense fraud investigations rose 30% between 1982 and 1984. Furthermore, the fraud was not limited to defense contractors. During the years 1983 through 1986, the Department of Health and Human Services tripled its prosecution referrals for fraud. Also, during a two-and-a-half-year period, the United States General Accounting Office (GAO) identified over 77,000 fraud cases in 21 different agencies.

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been convicted of conspiracy to defraud the United States in its role as a defense contractor, and for making false statements to the Government. *United States v. Hughes Aircraft Co., Inc.*, 20 F.3d 974 (9th Cir. 1994) (affirming conviction).

The amended FCA encourages anyone with knowledge of false claims on the part of Government contractors to bring a *qui tam* action. There are only limited exceptions to this, including, primarily, the public-disclosure provision at issue in this case. That provision, 31 U.S.C. § 3730(e)(4)(A), provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Thus, the statute deprives courts of jurisdiction over *qui tam* actions brought by persons who do not qualify as original sources[11] where the case is *(a)* "based upon" *(b)*

Whistleblower Litigation 34-35 (Michie 1994) (footnotes omitted).

[11] 31 U.S.C. §(e)(4)(B) provides:

> For purposes of this paragraph, "original source" means an individual who has direct

"public disclosure" of *(c)* "allegations or transactions" *(d)* in *(1)* "a criminal, civil or administrative hearing; *(2)* "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation; or *(3)* "from the news media."[12]

A. THE COURT OF APPEALS CORRECTLY HELD THAT THERE WAS NO PUBLIC DISCLOSURE IN THIS CASE

There appears to be no dispute that the purpose of the "public disclosure" rule and the "original source" exception is to encourage *qui tam* actions to combat wide-spread fraud while rejecting cases derived solely from certain prior public disclosures of that fraud. *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347 (4th Cir.), *cert. denied*, 115 S.Ct. 316 (1994); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992).

> and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

[12] The logical construction of this statutory list is that "the methods of 'public disclosure' set forth in section 3730(e)(4)(A) are exclusive of the types of public disclosure that would defeat jurisdiction under that section." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499 (11th Cir. 1991). However, because this case involves disclosures contained in an "administrative . . . report, audit, or investigation," this Court need not determine if the statutory enumeration is exclusive.

Petitioner asserts that there was a "public disclosure" of the allegations upon which Mr. Schumer brought suit because the Petitioner's cost-accounting noncompliance was the subject of audit reports which were available to a limited number of employees of Petitioner and its prime contractor, Northrop. They therefore challenge the court of appeals' conclusion that "revelation of information to an employee" of the company alleged to be engaged in conduct which violates the FCA or other companies upon whom "disclosure of such allegations could reflect negatively" does not "trigger the potential for corrective action presented by other forms of disclosure" and so does not constitute "public disclosure" within the meaning of § 3730(e)(4)(A).

The Ninth Circuit's holding placed it in conflict with the Second Circuit's holding, in *United States ex rel Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992), that "[o]nce allegations of fraud are revealed to members of the public with no prior knowledge thereof, the Government can no longer throw a cloak of secrecy around the allegations." The *Doe* court, concluding that the questioning by Government investigators of "innocent employees of John Doe Corp." constituted "public disclosure," affirmed dismissal based upon the jurisdictional bar of § 3730(e)(4)(A).[13]

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[13] *Doe* arose in circumstances which the Second Circuit obviously found distasteful. The *qui tam* relator was an attorney who had represented Meyerson, a target in the Government's investigation of John Doe Corp. Meyerson did not wish to bring a *qui tam* case against John Doe Corp., so Attorney Doe brought the case himself. Attorney Doe asserted that Meyerson had waived any interest he might have had in such a case, but "steadfastly refused" to produce the alleged

So, this issue comes down to the meaning of the words "public disclosure." The *New Shorter Oxford English Dictionary* (Clarenden Press 1993) defines "public" first as being "[o]f or pertaining to the people as a whole; belonging to, affecting or concerning the community or nation." Subordinate definitions include such language as: "Open or available to, used or shared by, all members of a community; not restricted to private use." The same dictionary defines "disclosure" as "[t]he action or an act of making known or visible." *Id.* "Public disclosure," then, is "the action or an act of making known or visible" "to the people as a whole." This Court's preference for the plain meaning of words should lead it to conclude that public disclosure occurs only when essential "allegations or transactions" which give rise to a *qui tam* complaint are made known or visible to the people as a whole—that is, publicly available.[14]

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waiver to the United States. 960 F.2d at 320. The Second Circuit placed "[e]thical implications aside" (*id.* at 319), but its dismay over Attorney Doe's conduct is manifest.

[14] This simple, linguistically-honest approach to the problem of what constitutes a "public disclosure" has not escaped judicial notice. Two years after *Doe*, the D.C. Circuit held:

> The language employed in §3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions only when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.

United States ex rel. Springfield Terminal Railway v. Quinn, 14 F.3d 645, 654-57 (D.C. Cir. 1994). And the Tenth Circuit

Here, the Ninth Circuit concluded that disclosure of a company's fraud to innocent employees of that corporation is not a "public disclosure." Petitioner and its *amici* are offended by the proposition that such employees are not, "members of the public." In fact, however, common usage of the phrase "public disclosure" references disclosure outside of an organization or group. Had Congress meant the phrase "public disclosure" to mean anything other than making available to the general public, it could have easily used the words "disclosure to any person." Under such language, "original sources" would

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recently held:

> Information to which the public has potential access, but which has not actually been released to the public, cannot be the basis of a parasitic lawsuit because the relator must base the *qui tam* suit on information gathered from his or her own investigation. If a specific report detailing instances of fraud is not affirmatively disclosed, but rather is simply ensconced in an obscure Government file, an opportunist *qui tam* plaintiff first would have to know of the report's existence in order to request access to it. With regard to such materials, which are at best 'only potentially in the public eye,' we agree with the District of Columbia Circuit that 'no rational purpose is served—and no 'parasitism' deterred—by preventing a *qui tam* plaintiff from bringing suit based on their contents.'

United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1520 (10th Cir. 1996), *quoting Quinn*, 14 F.3d at 653.

still be able to pursue *qui tam* cases, and the impact would have been precisely that achieved by *Doe* and urged by Petitioner— disclosure to anyone who is conceivably a member of "the public" would trigger the jurisdictional bar.

The Senate Report observes that "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities." S. Rep. at 4, *reprinted in* 1986 U.S. Code Cong. & Ad. News at 5269. While the *Doe* majority implied that its analysis reflected application of a "practical, commonsense interpretation to 'public disclosure'" (*Doe*, 960 F.2d at 322, *quoting United States ex rel. Stinson v. Prudential Insurance Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991), that assertion does not mesh with the reality understood by Congress.

In fact, what common sense actually teaches is that employees who are aware of problems at their workplace are unlikely to take steps they can be reasonably sure will place both their employer and their livelihood at risk. The highly-publicized stories of whistleblowers from Frank Serpico to Karen Silkwood to recent tobacco-industry defectors highlight for all to see the personal devastation which sometimes results from the taking public of damaging information about one's employer. That doing so will lead to ostracization, career stagnation, or job loss, is a commonplace.[15] Given these realities, the fact that

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[15] The fact that whistleblowers typically face personal and professional devastation is well-chronicled in Glazer, M. & Glazer, P., *The Whistle-Blowers: Exposing Corruption in*

Mr. Schumer's co-workers—or the "innocent" employees interviewed by Government investigators in *Doe*—were under no legal mandate to keep quiet regarding what they knew, is a scant basis for belief that the truth will out as soon as a "stranger to the fraud" knows something of a contractor's fraud.[16]

It is even more obvious that those who are perpetrating the fraud are the least likely to attempt to bring their employer's conduct before the public eye. Yet Petitioner argues that because those who are *not* "strangers to the fraud"—*a fortiori*, participants in the fraud—will remain free to bring *qui tam* actions against their employer, this Court should apply the most restrictive interpretation of "public disclosure" which creative lawyering can conceive.[17]

Government & Industry (Basic Books 1989).

[16] This is particularly true given the control which an employer—and especially a large employer—has over the flow of information to its employees, as well as the manner in which information is characterized. Secrecy in the world of defense contracting is very often mandated by law, and always encouraged; that, coupled with an employer's grip on the reins of an employee's livelihood, shows the dubious' nature of the conclusion that disclosure to a "stranger-to-the-fraud" employee is "public" disclosure.

[17] The Tenth Circuit recently came quite close to this zenith, holding that a *qui tam* relator who shows an audit report to a representative of the American Association of Retired Persons assisting him with an age-discrimination claim has made a "public disclosure." *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.2d 1000 (10th Cir. 1996). This leads to the conclusion that one who finds evidence of her

The plain language of the statute, requiring as it does "public disclosure," warrants affirmance on this issue. However, should the language be viewed as anything other than wholly clear, then the Court may "look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). As noted above, the purpose of the False Claims Act "as a whole" is to "encourage more private enforcement suits." It is the interest of Petitioner and each of its many *amici* to *discourage* more private enforcement suits. The result they now urge Is palpably antithetical to the intent of Congress in passing the 1986 amendments to the False Claims Act.

B. The Rule of Lenity Has No Application Here. The FCA is Remedial; Is Not Criminal; Is Constitutional; And, As To "Public Disclosure," Is Clear

By way of coda, we briefly address the peculiar contention of Petitioner's *amicus* Washington Legal Foundation that this Court apply the "rule of lenity" in interpreting the jurisdictional bar of § (e)(4). *Br. Amicus Wash. Legal Fdn.* at 22. This suggestion is patently specious.

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employer's fraudulent conduct cannot discuss it with a spouse, parent, sibling, or, presumably, pastor or priest, without having made a "public" disclosure thereof. The caprice of such a rule plainly goes against both the words of the statute and the public interests underlying the False Claims Act, and accomplishes naught but the dismissal of potentially-meritorious lawsuits on irrelevant grounds.

The False Claims Act is a civil, remedial statute. The FCA simply "afford[s] the Government complete indemnity for the injuries done." *United States ex rel. Marcus v. Hess*, 317 U.S. at 549. Throughout the proceedings leading to the 1986 amendments to the Act, Congress noted that the FCA is "a civil remedy designed to make the Government whole for fraud losses[.]" S. Rep. at 6, 1986 U.S. Code Cong. & Ad. News at 5271. The Senate Report cited the following excerpt from this Court's decision in *Hess*:

> [In] *United States v. Griswold*, 24 F. 361, 366 (D. Ore 1885) ... the [District] Court said: 'The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly.'"

S. Rep. at 11, 1986 U.S. Code Cong. & Ad. News at 5276. The Report offers this additional observation:

> Inasmuch as False Claims Act proceedings are civil and remedial in nature and are brought to recover compensatory damages, the Committee believes that the appropriate burden of proof devolving upon the United States in a civil False Claims Act suit is by a preponderance of the evidence.

S. Rep. at 31, 1986 U.S. Code Cong. & Ad. News at 5296. Given the remedial nature of the FCA, the *amici's* suggestion that the Court mandate a "restrictive interpretation of the 'public disclosure' bar" (*Br. Wash. Legal Fdn.* at 18) makes no sense: Remedial statutes are construed broadly

to effectuate their purposes.

The rule of lenity has no place in the interpretation of civil, remedial statutes. It is "rooted in the . . . belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property[.]" *Huddleston v. United States*, 415 U.S. 814, 831 (1974).

Moreover, the suggestion of the *amicus* that the "dubious constitutionality" of the FCA's *qui tam* provisions makes the rule of lenity applicable does no more than highlight the elaborate lengths necessary to make sense of the theory of Petitioner and its *amici* regarding what constitutes "public disclosure"—a tacit concession that the plain language of the law provides them no comfort. The fact is, the constitutionality of the *qui tam* provisions of the FCA is "questionable" only to Petitioner's *amicus*. Each court confronted with constitutional challenges to it has rejected them.[18]

Finally, the rule of lenity applies only where there is statutory ambiguity. *United States v. Yermian*, 468 U.S. 63, 75 (1984). While Petitioner and its *amici* go to considerable lengths to justify their tortured construction of the words "public disclosure," those two words simply do not carry with them the ambiguity which would lead this

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[18] *E.g.*, *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 127 L.Ed.2d 433 (1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 125 L.Ed.2d 663 (1993); *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1977).

Court to utilize the rule of lenity, even were the FCA a criminal statute.

If any goal other than reducing the number of *qui tam* lawsuits is served by the "any member of the public, including stranger-to-the-fraud employees of the perpetrator" rule which Petitioner and its *amici* urge, they have failed to identify it. This Court should give full voice to the intent of Congress, which is in direct opposition to that of Petitioner, and declare that "public disclosure" means neither more nor less than "making known or visible" "to the people as a whole"— general public availability. That is what the statute says, and that is entirely consistent with the Congressional purposes expressed in the 1986 amendments to the False Claims Act.

CONCLUSION

With respect to both the actual-damages and the public-disclosure issues raised by Petitioner, the judgment below should be affirmed.

Dated: January 3, 1997

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